UNITED STATES
v.
HERB PENROSE

IBLA 72-279 Decided May 1, 1973

Appeal from decision (Nevada A 518 (A&B)) of Administrative Law Judge 1/ John R. Rampton, Jr., declaring the Concrete Mix Nos. 1 and 2 placer mining claims null and void.

Affirmed.

Mining Claims: Common Variety of Minerals: Generally -- Mining Claims: Determination of Validity

To satisfy the requirements for discovery on a placer mining claim located for a common variety of material before July 23, 1955, it must be shown that the exposed material could have been removed and marketed at a profit on that date, as well as at the present time; where such a showing is not made, the claim is properly declared null and void.

Mining Claims: Common Variety of Minerals: Generally -- Mining Claims: Determination of Validity

It is not enough that a claimant demonstrate that merely a profit or prospect of a profit be present to validate a "common variety" claim. The sale of minor quantities of material at a profit, or the disposal of substantial quantities at no profit, does [**2] not demonstrate the existence of a market for the material found on a particular mining claim which would induce a man of ordinary prudence to expend his labor and means in an attempt to develop a valuable mine on that claim.

Mining Claims: Discovery: Marketability

It is the obligation of a mineral claimant to maintain adequate business records or other means of proof to support his contentions as to sales and marketability at a profit of the mineral material in his claim.

1/ The change of title of the hearing officer from "Hearing Examiner" to "Administrative Law Judge" was effectuated pursuant to order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).

APPEARANCES: George W. Abbott, Esq., Abbott & McKibben, Minden, Nevada, for appellant; Otto Aho, Field Solicitor, Department of the Interior, Reno, Nevada, for the Government.

OPINION BY MR. RITVO

Herb Penrose has appealed from a decision of the Administrative Law Judge dated January 5, 1972, declaring the Concrete Mix Nos. 1 and 2 placer mining claims invalid. The Concrete Mix Nos. 1 and 2 were sand and gravel claims located on August 9 and 24, 1954, respectively (amended on November 30, 1955, to correct errors in location). The Judge concluded that the mineral deposit on the claim, sand and gravel, was a common variety within the purview of section 3 of the Act of July 23, 1955, 30 U.S.C. § 611 (1970); that only a sporadic market for minor amounts of the material had been shown to exist before that date or since (except for a one-month period in 1966), that bona fides in development of the claims had not been shown, that there was no possible market other than for small and sporadic sales.

In his appeal, appellant contends that the Judge erred in concluding that (1) there was not bona fide development; (2) there is no market for the materials; (3) valuable minerals have not been found; and (4) that he proceeded in good faith in working the claims.

In substance these same arguments were used in the case below. The Judge has well set out the evidence, the arguments, the applicable law and precedents and conclusions of fact and law. We see no necessity to restate what he has determined. Therefore, except as noted, we adopt his decision which is affixed hereto as Appendix A.

The basic principles of law applicable to this case are now well-established and need no extensive elaboration. For a mining claim to be valid there must be discovered on the claim a valuable mineral deposit. A discovery exists:

> [W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine * * *. Castle v. Womble, 19 L.D. 455, 457 (1894); United States v. Coleman, 390 U.S. 599 (1968).

This test, the prudent man rule, has been refined to require a showing that the mineral in question can be extracted, removed, and presently marketed at a profit, the so-called marketability

test. United States v. Coleman, supra. This present marketability can be demonstrated by a favorable showing as to such factors as the accessibility of the deposit, bona fides in development, proximity to market, and the existence of a present demand. Palmer v. Dredge Corporation, 398 F.2d 791 (9th Cir. 1968), cert denied, 393 U.S. 1066 (1969); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); Osborne v. Hammit, Civil No. 414 (D. Nev., August 19, 1964).

Furthermore, since Congress withdrew common varieties of sand and gravel from location under the mining laws on July 23, 1955 (30 U.S.C. § 611 (1970)), it is incumbent upon one who located a claim prior to that date for a common variety of sand and gravel to show that all the requirements for a discovery, including a showing that the materials could have been extracted, removed, and marketed at a profit, had been met by that date, Palmer v. Dredge Corporation, supra, United States v. Barrows, 404 F.2d 749 (9th Cir. 1968), cert denied, 394 U.S. 974 (1969), and at the present time as well; where such a showing is not made, the claim is properly declared null and void. United States v. Paul M. Thomas, 2 IBLA 209, 78 I.D. 5 (1971).

It is not enough that a claimant demonstrate that merely a profit or prospect of a profit be present to validate a "common variety" claim. As here, for example, where there is every indication that appellant spent little or even nothing, other than the time required for location, to improve the claim, a sale, of $1.00 would in fact be a "profit" for a claimant. It is unconscionable to think that the intent of the mining laws was to authorize the issuance of patent for fee title to land to anyone who derived or foresaw any profit no matter how small from minerals on the claim, particularly where no effort was expended to explore [**6] for and extract the minerals. The Department has long held that the sale of minor quantities of material at a profit, or the disposal of substantial quantities at no profit, does not demonstrate the existence of a market for the material found on a particular mining claim which would induce a man of ordinary prudence to expend his labor and means in an attempt to develop a valuable mine on that claim. United States v. Adrian Edwards, 9 IBLA 197 (1973), United States v. California Soylaid Products, Inc., 5 IBLA 179, 193 (1972); United States, v. E. A. Barrows and Esther Barrows, 76 I.D. 299 at 306, 310 (1969). See United States v. Alfred Coleman, A-28447 (March 27, 1962), aff'd. United States v. Coleman, 390 U.S. 599 (1968); United States v. Joe H. York and Jemina York, A-28806 (August 16, 1962); United States v. William M. Hinde, A-30634 (July 9, 1968); United States v. John C. Chapman, A-30581 (July 16, 1968).

The Judge found that the sand and gravel on the claims were not marketable at a profit on or before July 23, 1955. His finding is fully supported by the record.

As noted above, the appellant asserts bona fides in development. In view of the other reasons compelling a conclusion that the claims are invalid, we find it unnecessary to rule on this issue. To the extent that he found there was no bona fides, we do not adopt the Judge's decision.

We find particularly persuasive the evidence that there is not now a sufficient market for the sand and gravel on the claims to sustain their validity, assuming for the sake of argument, that one or both of them may once have been valid.

Since 1962 there has been another source of supply which the major consumer leases (Tr. 123) and uses to the practical exclusion of appellant's claims. (Tr. 119, 120). He turns to appellant's claims occasionally to get a dark green color stone to use as exposed aggregate for tilt-up slabs. The other market apparently consists of sporadic sales to individuals who buy a yard or two. The appellant offered no evidence or records to support the size of this limited market. As to the importance of business records, see United States v. California Soylaid Products, Inc., supra, at 190 (1972); United States v. E. A. Barrows and Esther Barrows, supra, 76 I.D. at 312. It is the obligation of a mineral claimant to maintain adequate business records or other means of proof to support his contentions as to sales and marketability at a profit of the mineral material in his claim.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Martin Ritvo, Member

We concur:

Frederick Fishman, Member

Joseph W. Goss, Member.

January 5, 1972

DECISION

UNITED STATES OF AMERICA,

Contestant

v.

HERB PENROSE,

Contestee

NEVADA 518 (A&B)

Involving the validity of the Concrete Mix Nos. 1(a) and 2(B) placer mining claims situated in Sec. 12, T. 15 N., R. 25 E., Mount Diablo Meridian, Lyon County, Nevada.

Statement of the Case

The Concrete Mix Nos. 1 and 2 placer mining claims were located by Herb and W. M. Penrose on August 9 and 24, 1954, respectively. The locations were amended on November 30, 1955, to correct errors in location. The Concrete Mix No. 1 claim is located in the NE¼NE¼SW¼, NW¼NW¼SE¼, and the Concrete Mix No. 2 claim is located in the S½NW¼SE¼ of section 12, Township 15 North, Range 25 East, Mount Diablo Meridian, Lyon County, Nevada (Contestee's Exhibits A, B, C and D). W. M. Penrose is deceased and his son, Herb Penrose, is the sole owner of the contested claims.

On February 21, 1968, a complaint was filed alleging:

1. The land embraced within the claims is non-mineral in character.

2. The material found within the limits of the claims is not a valuable mineral deposit under Section 3 of the Act of July 23, 1955 (69 Stat. 367; 30 U.S.C. 601).

3. Valuable minerals have not been found within the limits of the claims so as to constitute a valid discovery within the meaning of the mining laws.

4. No discovery of a valuable mineral has been made within the limits of the claims because the mineral materials present cannot be marketed at a profit now and/or could not be marketed at a profit prior to the Act of July 23, 1955.

The Contestee filed an answer denying the allegations.

A hearing was held on March 17, 1970, at Yerington, Nevada. Mr. Otto Aho, Office of the Solicitor, U. S. Department of the Interior, Reno, Nevada, represented the Contestant. Mr. George W. Abbott, Attorney, Minden, Nevada, represented the Contestee.

## The Evidence

The Contestant's only witness was Harry W. Mallery, a geologist and engineer employed by the Bureau of Land Management. He examined the claims nine times during the period commencing September 15, 1966 and ending March 16, 1970 (Tr. 11). He testified that the claims are located approximately 17 miles from Yerington, Nevada, which has a population of 2,300, and about 4-7/10ths miles from Wabuska which has three houses, a railroad siding and a population of 15 (Tr. 18-19; Government's Exhibits 1 and 2). The claims are situated on a gently sloping alluvial fan at the base of the Desert Mountains. Sand and gravel is the only mineral found on the claims (Tr. 20-21) and it exists in "a gravel bar or terrace" which extends in a northwesterly and southwesterly direction across the Concrete Mix No. 2 claim and proceeds in a southeasterly direction out of the Concrete Mix No. 2 (Tr. 12, 17).

Mr. Mallery prepared a sketch map (Government's Exhibit 3) with a plastic overlay showing the location of the claims. There was some confusion in locating the claims with respect to the two survey corners which lie near the southeast corner of section 12, but he finally determined that all of the excavation work that had been done was on the Concrete Mix No. 1 and that no work had been done on the Concrete Mix No. 2. He said that other than one major removal of material in 1966, there had been only minor amounts of material removed during the years from 1956 to 1967 and apparently most of the removals were done by way of the annual assessment work (Tr. 40-42). On his first examination on September 16, 1966, he found only a small pit on the Concrete Mix No. 1 and was told that removal of the gravel from this pit had begun only the previous day.

Other than the access road, this was the only working or improvement that he found on either claim.

On his next examination on October 18, 1966, he found that the pit on the Concrete Mix No. 1 had been enlarged to approximately a size of 1,000 feet by 400 feet and about 80,000 cubic yards of material had been removed during the period from September 16 to October 18, 1966 (Tr. 27-29). Upon inquiry, he ascertained that the material had been removed by the Helms Construction under a contract with Mr. Penrose for the construction of a power plant for the Sierra-Pacific Power Company, approximately five miles from the claim. The material was used as "fill material to establish a base upon which to construct a power plant, a base which had predictable engineering characteristics." (Tr. 30-32, 68-70).

Mr. Mallery testified that other than the one large removal in September-October 1966, only minor amounts of material have been removed sporadically from the contested claim (Tr. 38-42, 49-80). He found no workings or evidence of any removal of material from the Concrete Mix No. 2 claim (Tr. 44). Of the gravel bar or terrace on the claims, he estimated that about 40,000 cubic yards of this quality gravel remained. This gravel is suitable for concrete aggregates and other general uses. The material outside the gravel bar is suitable only for fill purposes (Tr. 32-35, 65-68). He said that Yerington is the only possible market for the material from the claims and he knew of no material being hauled from the claims to Yerington. Wabuska cannot be considered as a market either, because it is "a very, very small hamlet" (Tr. 44-45).

The Contestee called Mr. William W. Brooks, Superintendent of Buildings for the City of Reno and formerly a superintendent of construction with Walker Boudwin and J. C. Dillard for about 25 years. From 1952 to about 1957, Mr. Brooks operated the Brooks Concrete Company, a small sand and gravel company located near Yerington, Nevada. During the four or five years that he operated this company he removed approximately 15,000 to 20,000 cubic yards of material from the Concrete Mix No. 1 which was used in the construction of various buildings. As compensation for the material removed, he performed the required annual assessment work for the Contestee by "stripping the overburden" on the claims and he also put in "boxes and headgates" on the Penrose Ranch.

The Concrete Mix No. 1 claim was Mr. Brooks' sole source of material and the processing of the material represented the total production of his plant. He said that the sand and gravel from the claim is "exceptional" because "there is no dirt in it."

Ronald K. Munson, a materials testing engineer for the Nevada State Highway Department, testified regarding Contestee's Exhibits AA, BB, CC and DD, which pertain to tests made of the sand and gravel material from the claims. He stated that according to the exhibits, the material is suitable for all uses on State highway projects (Tr. 101-105).

Herbert Rowntree, a resident of Yerington, testified that he purchased the Brooks Concrete Company in July 1959 from William Brooks and operated the plant until March 31, 1960, when he sold it to Don Tibbals. During this period he produced approximately 1,000 cubic yards of "finished material" which he believed was removed from the pit on the Concrete Mix No. 1 claim (Tr. 106-110).

Don H. Tibbals, whose principal occupation is "general contracting", changed the name of the Brooks Concrete Company to Valley Ready Mix when he bought the company from Herbert Rowntree. He testified that he had purchased about 500 to 800 yards of material from Mr. Penrose each year since 1962, but his main source of materials for his Valley Ready Mix plant is from Artesia out of Halls pit, located approximately 12 miles from Yerington. He uses the material from Artesia because, "I can drill a well up there and wash the gravel and I was in a better location." He uses material from the contested claims only if he wants "a special aggregate with a fine color or something . . ." (Tr. 117-125). He paid Mr. Penrose for the material from the Concrete Mix claims by doing the assessment work. The assessment work consisted of pushing the overburden off the top of the pit and down onto the flats and scattering it out, putting in backhoes, maintenance of the access road and cutting "a cross section in various places of that pit." (Tr. 117).

Pete Perumean, a dairyman from Yerington, testified for the Contestee. He said he had hauled material from the Concrete Mix No. 1 claim in 1958 to build mangers for his dairy. He, too, paid Mr. Penrose for the material by doing assessment work on the claims and hauling material to Mr. Penrose's place. He removed approximately 300 yards of material.

Another witness for the Contestee, Enide T. Johnson, who operates the Seven-up Ranch in the Wabuska District, used gravel from the contested claims in 1958 for building a concrete slab upon which they store their "cubed hay". In payment for the gravel, assessment work was done on Mr. Penrose's claims (Tr. 128-131).

Contestee Penrose testified that he runs a ranch and is employed at Anaconda Copper Company and that his grandfather "found" the claims in the early '80's. He said his neighbors had been hauling gravel out of the northwest corner of the pit on the Concrete Mix No. 1 for a good many years before he actually located the claims in 1954. The assessment work on the claims consisted of building dikes to divert the water, building roads and stripping new ground. He stated that each year there has been some disposal of gravel from the claims. In several instances, the gravel was exchanged for doing the annual assessment work. In 1959, Mr. Penrose filed a complaint against Lyon County and was awarded a judgment by stipulated settlement for $400 as compensation for the removal of 300 yards of material which was used for the construction of abutments in the highway west of Wellington (Contestee's Exhibits U, V and W; Tr. 132-153).

## The Applicable Law

Section 3 of the Act of July 23, 1955 (30 U.S.C. § 611), amended the mining laws by removing common varieties of sand and gravel from the category of valuable mineral deposits subject to location under the mining laws. The 1955 Act is applicable to mining claims located prior to July 23, 1955, but not perfected by discovery prior thereto. See Clear Gravel Enterprises, Inc., The Dredge Corporation, Inc., A-27967, A-27970 (December 29, 1959), affirmed Palmer v. Dredge Corporation, 398 F.2d 791 (9th Cir. 1969), cert denied, 393 U.S. 1066 (1969); United States v. Frank and Wanita Melluzzo, 76 I.D. 181 (1969).

To determine whether material is an uncommon variety within the meaning of the 1955 Act, the mining claimant must establish (1) that the deposit has unique property and (2) that the unique property gives it a distinct and special value. In applying these criteria, there must be a comparison of the deposit under consideration with other deposits of similar materials and it must be shown that the material under consideration has some property which gives it value for purposes for which the other materials are not suited. Or, if the material is to be used for the same purposes as other minerals of common occurrence, it must possess some property which gives it a special value which is reflected by the fact that it commands a higher price in the market place. Differences in chemical composition or physical properties are immaterial as they do not result in a distinct economic advantage of one material over another. See United States v. Clark County Gravel, Rock and Concrete Company, A-31025 (March 27, 1970);

United States v. Norman Rogers, A-31049 (March 3, 1970); United States v. U.S. Minerals Development Corporation, 75 I.D. 127 (1968).

The requirements for a valid discovery on a placer mining claim located for sand and gravel has been the subject of numerous decisions of the Department of the Interior. In United States v. Alfred N. Verrue, 75 I.D. 300, 306 (1968), it is stated that:

> The basic principles applicable to this case are well established, having set forth in numerous Departmental decisions and sustained in the courts, notably in United States v. Coleman, 390 U.S. 599 (1968), and in Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). In order to satisfy the requirement of discovery on a placer mining claim located for sand and gravel prior to July 23, 1955, it must be shown that, prior to that date . . . the deposit could be extracted, removed and marketed at a profit. This marketability can be demonstrated by a favorable showing as to such factors as the accessibility of the deposit, bona fides in development, proximity to market, and the existence of a present demand for the sand and gravel, i.e., that a demand existed when the deposit was subject to mining location. It is not enough to show that a market exists for sand and gravel and that a particular deposit is of such quality as to satisfy the standards of the market and that it occurs in such quantity as to make removal operations practicable, but it must be shown, as well, that the particular deposit itself can, and could at the critical date, be mined and marketed at a profit. See, e.g., United States v. Everett Foster et al, 65 I.D. 1 (1958), affirmed in Foster v. Seaton, supra; United States v. Charles L. Seeley and Gerald F. Lopez, A-28127 (January 28, 1960); United States v. Keith J. Humphries, A-30239 (April 16, 1965); United States v. Gene DeZan et al, A-30515 (July 1, 1968).
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> We wish to emphasize two critical elements in this last statement. The first is that it is essential to show not only that the minerals in question could have been sold at the critical date but that they could have been sold at a profit. This was very recently confirmed by the Supreme Court in United States v. Coleman, supra:

> * * * Minerals which to prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable. Thus, profitability is an important consideration in applying the prudent-man test, and the marketability test which the Secretary has used here merely recognizes this fact. 390 U.S., at 602-603.

> The second critical factor is that, especially where minerals are of widespread occurrence, it must be shown that minerals from the particular deposit in question could have been marketed at a profit. United States v. Keith J. Humphries, supra; United States v. Loyd Ramstad and Edith Ramstad, supra; Osborne v. Hammitt, Civil No. 414 (D. Nev., August 19, 1964).

The requirement that sand and gravel from the particular deposit could have been marketed at a profit is a continuing requirement from the date of location of the claim and at all times thereafter until patent issues. The requirement is not met by merely showing a few isolated sales at various intervals of time. The Department has also held that the sale of minor quantities of materials at a profit or the disposal of substantial quantities at no profit, does not demonstrate the existence of a market for the material found on a particular mining claim which would induce a man of ordinary prudence to expend his means in an attempt to develop a valuable mine on that claim. See United States v. Alfred Coleman, 390 U.S. 599 (1968); United States v. Jill H. York and Jemina York, A-28806 (August 16, 1962); United States v. William H. Hinde et al, A-30634 (July 9, 1968); United States v. John C. Chapman et al, A-30581 (July 16, 1969); United States v. Alfred N. Verrue, supra.

In the case of Alfred N. Verrue, supra, it is stated that:

> Good faith in the development of a mining claim implies the performance of such acts as are calculated to comply with the requirements of the law and to utilize the mineral resources present on the claim. Before there can be bona fides in development there must be acts of development. This is not to say that the locator of a mining claim must immediately commence mining his claim in order to establish his good faith in locating the claim. He must, however, demonstrate by some means that the value of the claim is such as to induce men to expend money and effort in extracting

> the minerals from the earth, for it was never intended that a right to patent could be founded upon nothing more than claiming and holding lands of conjectural mineral worth in the hope that they might some day prove to be of substantial value. . . . bona fides in development can be demonstrated only by the performance of positive acts . . . .

Findings of Fact
and
Conclusions of Law

There is no question that the sand and gravel material on the Concrete Mix Nos. 1 and 2 mining claims is a common variety within the purview of section 3 of the Act of July 23, 1955. It, therefore, follows that there must be demonstrated a market for the material found on the claim prior to the date of that Act. Contestee Penrose has never been in the sand and gravel business himself and he never produced any sand and gravel from the claims before July 23, 1955. Prior to this date, only minor amounts of sand and gravel were removed sporadically from the Concrete Mix No. 1 claim by persons other than Mr. Penrose -- principally by William W. Brooks who performed the required annual assessment work in payment for the material removed.

No material has ever been removed and marketed from the Concrete Mix No. 2 claim and no work has been done to determine the extent of the sand and gravel deposit on this claim. A temporary market was in existence for the sand and gravel on the Concrete Mix No. 1 claim during the period of September-October 1966 when approximately 80,000 cubic yards of material was removed for use in connection with the construction of the Sierra-Pacific Power Company's power plant. This market ceased when the power plant was completed. At all other times, the market was sporadic and the only benefits received by Mr. Penrose was work done for the performance of annual assessment work. No action was taken by Mr. Penrose to determine the extent of the sand and the gravel, and prior to July 23, 1955 he had not established the quality and quantity of the sand and gravel. It cannot be said that there was bona fides in development of the claims as would enable a reasonably prudent man to determine the extent of the sand and gravel deposit existing.

The only market for the material on the claims is Yerington, Nevada, a town of 2,300 people, situated approximately 17 miles

away. Only a few yards of the material have been used in Yerington and there are alternative sources of the same type of material closer to this possible market. Other than the large 80,000 cubic yards of material sold for use in the Sierra-Pacific Power Company's plant, the sales have been sporadic and in very small amounts. The sales were made to ranchers and residents outside of Yerington and in proximity to the claims. These sales cannot constitute a continuing market. While it is not necessary for actual sales to be made to demonstrate that a market exists for the material on the claims, it must be demonstrated that the material could be sold at a profit, and no such possible market exists other than a continuation of occasional sales to neighbors and residents of the general area surrounding the claims. I, therefore, conclude that the Contestant has established a prima facie case substantiating the allegations of the complaint and that this prima facie has not been overcome by the Contestee.

## Final Conclusion

The Concrete Mix Nos. 1 and 2 placer mining claims are invalid and are hereby declared to be null and void.

John R. Rampton, Jr.
Hearing Examiner